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Cheryl Dalby

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Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDPa

Cheryl Dalby*

Introduction

At fourteen years old, Carmen has a warrant issued for her arrest.¹ Carmen has not committed any crime.² Instead the juvenile court issued the warrant based on allegations that she ran away from a shelter and engaged "in illicit sex."³ Carmen's mother, unable to deal with Carmen's boyfriends and sexual behavior, begged the juvenile court to exercise its authority and change Carmen's behavior.⁴ Carmen's mother wants the state to become responsible for her daughter.⁵ A judge agreeing with Carmen's mother, could order Carmen to reside in a secure facility for an indefinite period of time.⁶ Under the 1980 "valid court order" amendment⁷ to the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPa)⁸ a judge may incarcerate Carmen even though she has not committed a criminal act.

This article examines the 1980 amendment to the JJDPa and the amendment's effect on female status offenders.⁹ Part I of the article explores the history of paternalism toward children and women and the restrictions on female sexuality. It also examines the traditional rehabilitative and punitive roles of the juvenile courts

* B.A., Psychology, University of Minnesota; J.D., expected, University of Minnesota, 1995.

1. Lynn Smith, *A Mother Discovers the System Doesn't Work for Runaways*, L.A. TIMES, Nov. 15, 1987, § 2, at 1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See *infra* notes 92-102 and accompanying text.

7. 42 U.S.C. § 5633(a)(12)(A) (1988) (codifying Act of Dec. 8, 1980, Pub. L. No. 96-509, § 11(a)(13), 94 Stat. 2757).

8. 42 U.S.C. §§ 5601-780 (1988 & Supp. 1989).

9. Status offenses are acts committed by juveniles that would not be criminal if committed by an adult. BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE* (3rd ed. forthcoming 1994). Examples of status offenses include running away from home and truancy. *Id.* This article will analyze the JJDPa in terms of its effect on juveniles who commit status offenses.

and how these roles relate to paternalism. Part II examines the forces behind the enactment of the "valid court order" amendment and the amendment's impact on status offenders. Part III identifies judicial discretion available through the "valid court order" amendment and the relationship of paternalism to judicial discretion. It also discusses problems with the punitive aspects of the amendment. Finally, Part IV proposes changes to the present juvenile system that would limit the discriminatory effect of the JJDPA on female status offenders.

I. Paternalism¹⁰ Toward Female Status Offenders: An Historical Overview

A. Paternalism Toward Children

The paternalistic treatment of status offenders has deep societal roots.¹¹ Throughout history, society has viewed children as the property of their parents.¹² In ancient times, men increased their wealth by appropriating "as property, . . . children, to be worked, traded, married off, or sold as slaves, as the case might be."¹³ Roman society treated children as chattels.¹⁴ American colonial law

10. For the purposes of this article the word "paternalism" refers to the definition provided by Gerda Lerner:

Paternalism, or more accurately *Paternalistic Dominance*, describes the relationship of a dominant group, considered superior, to a subordinate group, considered inferior, in which the dominance is mitigated by mutual obligations and reciprocal rights. The dominated exchange submission for protection, unpaid labor for maintenance. In its historical origins, the concept comes from family relations as they developed under patriarchy, in which the father held absolute power over all the members of his household. In exchange, he owed them the obligation of economic support and protection. The same relationship occurs in some systems of slavery; it can occur in economic relations, such as the *padrone* system of southern Italy or the system used on some contemporary Japanese industries. As applied to familial relations, it should be noted that responsibilities and obligations are not equally distributed among those to be protected: the male children's subordination to the father's dominance is temporary; it lasts until they themselves become heads of households. Daughters can escape it only if they place themselves as wives under the dominance/protection of another man. The basis of 'paternalism' is an unwritten contract for exchange: economic support and protection given by the male for subordination in all matters, sexual service and unpaid domestic service given by the female.

GERDA LERNER, *THE CREATION OF PATRIARCHY* 239-40 (1986) (emphasis in original).

11. For a more detailed discussion of this concept see *id.*

12. See generally Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (analyzing critically the history of two American constitutional case law lynchpins, its foundations and current effects).

13. LERNER, *supra* note 10, at 215.

14. Woodhouse, *supra* note 12, at 1044.

regarded children as "assets of paternal estates in which fathers had a vested interest."¹⁵ The child welfare debate in the late nineteenth and early twentieth centuries demonstrated a continued belief in children as chattels.¹⁶ This view of children continued even after the patriarchal family structure slowly began to deteriorate.¹⁷ By the end of the nineteenth century, married women had become legal entities, and policy-makers increasingly viewed children as individuals and subjects of public concern.¹⁸ Nonetheless, the notion that children are the property of men remained in the culture, statutes, and judicial opinions.¹⁹

As patriarchs lost power, the judiciary assumed the role of guardian.²⁰ Using their discretion, judges rewrote laws governing rights and duties within the home and between family members.²¹ As one commentator aptly noted, "[j]udges were the new kinds of patriarchs, ones invested with a power over some domestic relations that rivaled that of their predecessors."²² The judiciary perpetuated patriarchal models of family governance and continued to treat children as property; chattels to be possessed, transferred, and protected by adults.

B. Paternalism Toward Women

History is similarly replete with examples of society's paternalistic attitude toward women. Females were viewed first as the property of their fathers,²³ and after marriage, as the property of their husbands.²⁴ Case law reveals that in order to maintain women's value as property, men sought to preserve women's chastity.²⁵

Ancient laws restricted female sexual behavior, thereby protecting male property interests. Adultery laws provide an example

15. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 25 (1985).

16. Woodhouse, *supra* note 12, at 1065.

17. *Id.* at 1047.

18. *Id.* at 1039.

19. *Id.* at 1040 ("Patriarchal ideals and structures that treated the child as property of the parent continued to exist side-by-side with Lockean theories of individual liberty . . .").

20. GROSSBERG, *supra* note 15, at 300.

21. *Id.* at 290.

22. *Id.*

23. See *supra* notes 10-19 and accompanying text.

24. Gena Corea, *The Reproductive Brothel*, in *MAN-MADE WOMEN* 38, 42 (1987).

25. See, e.g., *State v. Liberta*, 64 N.Y.2d 152, 167-68 (1984) ("Rape statutes historically applied only to conduct by males against females, largely because the purpose behind the proscriptions was to protect the chastity of women and thus their property value to their fathers or husbands.").

of this kind of restriction. The Bible is the first known legal source prohibiting adultery.²⁶ Originally, adultery laws forced females to remain chaste in order to preserve the system of male patrilineage.²⁷ Adultery was seen as a crime against the husband, because the "unfaithful" wife could potentially bear another man's child. This potential, in turn, created the possibility that another man's child would inherit the family property. Given that men could more easily escape detection should their extramarital affair result in an offspring, the ban on extramarital sex subjected adulterous women to far more punishment and social disgrace than their male counterparts.²⁸ The Puritans brought adultery laws to America, and ensured strict enforcement.²⁹

Even today, after significant changes in the public's attitudes about sexuality,³⁰ fornication and adultery laws still exist in many states.³¹ In Minnesota, for example, a statute condemning adultery, characterized as a crime against the family, remains in effect.³² These laws not only bring into the twentieth century ancient notions of women as property, they operate to continue blatant sexism and discrimination.³³ Although these laws are

26. *Exodus* 20:14 (Seventh Commandment); *Leviticus* 20:10; *Deuteronomy* 22:22; see also MODEL PENAL CODE § 213.6, at 430 n.1 (1980) (noting that modern adultery prohibitions "derive from Biblical sources").

27. See Martin J. Siegel, *For Better or Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 46 & n.8 (1991-92) ("By bequeathing property only to the sons of their wives, men could be certain they were passing on their inheritance to their legitimate heirs. An economic system built on the concept of private property required sexual faithfulness within marriage for its survival.").

28. *Id.* at 47.

29. *Id.* at 48.

30. Our society today, although still repressive, allows for a greater display of sexuality.

31. Siegel, *supra* note 27, at 50 n.36 (listing 25 states that have retained their adultery laws).

32. The Minnesota adultery law is included in Chapter 609 of the Criminal Code, Crimes against the Family. MINN. STAT. § 609.36 (1992).

33. For example, the Minnesota Adultery law provides:

Subdivision 1. Acts constituting. When a married woman has sexual intercourse with a man other than her husband, whether married or not, both are guilty of adultery and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

Subd. 2. Limitations. No prosecution shall be commenced under this section except on complaint of the husband or the wife

Subd. 3. Defense. It is a defense to violation of this section if the marital status of the woman was not known to the defendant at the time of the act of adultery.

MINN. STAT. § 609.36 (emphasis added).

This blatantly sexist law provides for prosecution of a married woman and her partner while a married man and his unmarried partner can only be convicted of the lesser offense of fornication. Compare MINN. STAT. § 609.34 (1992) ("When any man

rarely used,³⁴ they remain available and are used by angry spouses.³⁵

In addition to adultery laws, society restricts female sexuality in other ways.³⁶ Statutory rape laws demonstrate another societal attempt to keep girls pure.³⁷ Statutory rape laws first surfaced in the Elizabethan age, when women were considered the property of their husbands or fathers.³⁸ Society valued a virginal bride as a more prized commodity than a woman who had previously engaged in sexual activity.³⁹ Thus, Elizabethan society ensured a woman's value by prohibiting female premarital sexual activity.⁴⁰

One need not go back to the Elizabethan age, however, to find evidence that statutory rape laws were intended to protect girls because they were the valued property of men. Freud alluded to this male right when he wrote that "[t]he demand that the girl shall bring with her into marriage with one man no memory of sexual relations with another is after all nothing but a logical consequence of the exclusive right of possession over a woman . . ."⁴¹ Statutory rape laws have long served to protect this "right of possession."

and single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor.").

34. Siegel, *supra* note 27, at 56.

35. In a recent Wisconsin case, a man used the state's adultery law against his wife in a bitter divorce case. See, Elizabeth Mehren, *What We Really Think About Adultery*, L.A. TIMES, June 2, 1991, part E, p.1, column 2; William E. Schmidt, *Adultery as a Crime: Old Laws Dusted Off in a Wisconsin Case*, N.Y. TIMES, April 30, 1990, Section A, P.1, Col. 1; Charles Bremner, *U.S. Court Deal Averts Trial of Adulteress*, THE TIMES (LONDON), May 9, 1990, overseas news section.

36. Abortion laws represent another way society limits reproductive options for women and thus controls female sexuality. One commentator has cast the abortion debate in terms of equal protection rather than due process. See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 101 (1985). Calabresi states that, "the essence of the argument in favor of abortion is an equality argument." *Id.* He further states, "without a right to abortion women are not equal to men in the law . . . with respect, that is, to sexual freedom." *Id.*

37. Maryanne Lyons, Comment, *Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault* 29 HOU. L. REV. 583, 586-87 (1992). "[T]he original purpose of making statutory rape a special offense was 'to protect virtuous maidens' or to protect the marriageability of minor females. Some American case law indicates that 'the purity of womanhood' was the main legislative impetus behind the enactment of some of the first statutory rape statutes." *Id.*

38. Marilyn J. Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 187 (1977-78).

39. *Id.* "Historically, the right to the sexual possession of the woman was a valuable commodity given to the husband by the father. Therefore, female chastity was much more revered than male chastity." *Id.*

40. *Id.*

41. See generally SIGMUND FREUD, CONTRIBUTIONS TO THE PSYCHOLOGY OF LOVE: THE TABOO OF VIRGINITY first published in SAMMLUNG KLEINER SCHRIFTEN ZUR NEUROSENLEHRE, (Vierte Folge, Vienna, 1918), reprinted in 4 COLLECTED PAPERS 217 (Ernest Jones, M.D. ed., Joan Riviere trans., 1925).

Recently, the United States Supreme Court upheld a statutory rape law in which a male could be prosecuted for having sex with an underage female, but a female could not be prosecuted for having sex with an underage male.⁴² This law in effect declared male teenage sexual activity acceptable while simultaneously proscribing similar female sexual activity. The California Supreme Court regarded the statute as a legitimate means of preventing teenage pregnancy.⁴³ A plurality of the United States Supreme Court agreed with the California court's characterization and upheld the law.⁴⁴

Society has used adultery, fornication, and statutory rape laws throughout history to "protect" women from sex. But these laws actually serve to protect men's property interest in women. The historic interest in maintaining women's chastity has led to more severe restrictions on female sexual activities than on male sexual activities.

C. *The Role of the Juvenile Courts*

The juvenile court has played a major role in maintaining the historical paternalism toward girls. Since its inception, the juvenile system has been designed to protect and to rehabilitate young offenders.⁴⁵ Progressives began the movement toward a separate ju-

42. *Michael M. v. Superior Court*, 450 U.S. 464 (1981). The law defined as unlawful sexual intercourse "an act of sexual intercourse accomplished with a female not the wife of a perpetrator, where the female is under the age of 18 years." CAL. PENAL CODE ANN. § 261.5 (West Supp. 1981).

43. The court stated that:

There can be no doubt that section 261.5 discriminates on the basis of sex because only females can be victims, and only males can violate the section. However, this obviously discriminatory classification scheme is readily justified by an important state interest [T]he law herein challenged is supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant. This changeless physical law, coupled with the tragic human costs of illegitimate teenage pregnancies, generates a compelling and demonstrable state interest in minimizing both the number of such pregnancies and their disastrous consequences. Accordingly, the Legislature is amply justified in retaining its historic statutory rape law because of the potentially devastating social and economic results which may follow its violation.

Michael M. v. Superior Court of Sonoma County, 601 P.2d 572, 575 (Cal. 1979).

44. 450 U.S. at 476. Justice Rehnquist, writing for the plurality, found that the state had an important interest in preventing illegitimate pregnancies and that the gender-based classification was sufficiently related to that end, "[b]ecause virtually all the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female." *Id.*

45. See *Commonwealth v. Fisher*, 62 A. 198 (1905) (denying a juvenile due process in a hearing in which he was sentenced to the local institution for delinquent boys).

venile court, advocating for a system that would save the wayward child and set him or her on a path to a more wholesome life.⁴⁶ The court's role of rehabilitation was possible under the doctrine of *parens patriae*, the state as parent.⁴⁷ This doctrine legitimated the use of informal, discretionary procedures in the juvenile courts.⁴⁸ In its paternal role, the presiding juvenile court judge determines the "best interests of the child" in an informal setting.⁴⁹ The court's inquiry centers around the child's lifestyle and character, rather than the offense committed.⁵⁰ Also consistent with this paternal model is the discretion afforded the juvenile court judge.⁵¹ In this rehabilitation model, the judge is given a great deal of freedom in sentencing. Such expansive discretion is given because the judge's task is to save the child, rather than punish the behavior. Until recently, the rehabilitative role of the juvenile court went largely unchallenged. In recent years, however, the system has come under attack for its punitive outcomes.⁵²

Critics maintain that the juvenile court, despite its stated rehabilitative goals, punishes children in much the same way as the adult system.⁵³ Most states have recognized the changing goals of juvenile courts and have changed their purpose statements to re-

46. See Barry C. Feld, *Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B. U. L. REV. 821, 824-25 (1988) [hereinafter *The Principle of Offense*] ("The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems and provide them with individualized treatment in a separate system."). For a thorough discussion of the Progressive movement see Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

47. The *Fisher* court was acting in the capacity of *parens patriae*. 62 A. at 202. To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection.

Id.

48. See *The Principle of Offense*, *supra* note 46, at 824-25.

49. See *id.* Juvenile court personnel use informal, discretionary procedures to "diagnose" the causes of delinquency and prescribe a cure. *Id.*

50. *Id.* at 825.

51. *Id.*

52. The Texas Court of Criminal Appeals argued that:

Although there are examples of quality probation and other treatment services, the truth is that these are few and far between. The majority of our youths are falling through rehabilitative cracks. Juveniles are often either exposed to experimental therapeutic techniques that are demeaning or violate fairness, or they are banished to institutions that fail to offer any treatment or accord with even minimal constitutional requisites. *The system is clearly far more punitive than rehabilitative.*

Lanes v. Texas, 767 S.W.2d 789, 798-99 (Tex. Crim. App. 1989) (emphasis added).

53. See Barry C. Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIME & DELINQ. 443 (1990);

flect an increasingly punitive approach to prosecuting juveniles.⁵⁴ Currently, only two states still adhere to the traditional "child's best interests" rationale to guide their juvenile courts.⁵⁵ In 43 other states, juvenile courts consider both public welfare and the welfare of the child.⁵⁶ In some states, public safety concerns significantly outweigh the child's interests.⁵⁷

The United States Supreme Court acknowledged that juvenile courts punish more often than they rehabilitate and consequently granted juveniles some due process rights in delinquency proceedings.⁵⁸ In 1967 the Court granted juveniles rights of notice, assistance of counsel, privilege against self incrimination, and the opportunity to confront and cross examine witnesses.⁵⁹ In the following years, the Supreme Court supplemented these rights with the right to have guilt proven beyond a reasonable doubt,⁶⁰ protection of the double jeopardy clause,⁶¹ and privilege against self-incrimination.⁶² In *McKeiver v. Pennsylvania*,⁶³ however, the Court stopped short of granting juveniles the right to a jury trial. These cases expressly limit due process rights to delinquency proceedings.⁶⁴

Janet Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N. CAR. L. REV. 1083 (1991).

This led the Supreme Court to comment that juveniles receive the "worst of both worlds." *Kent v. United States*, 383 U.S. 541, 556 (1966). They receive "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* But see, Alfred Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs An Overhaul*, 34 POL'Y & REV. 65 (1985) (arguing that the juvenile system coddles young criminals).

54. See Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 234 (1993).

55. *Id.* Only Kentucky and Massachusetts still regard the sole purpose of juvenile courts as serving the child's best interests. *Id.*

56. *Id.*

57. *Id.* In Minnesota, for example, the purpose of the juvenile courts is "to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior." MINN. STAT. § 260.011(2)(c) (1992).

58. Juveniles were first guaranteed certain due process rights in the landmark case of *In re Gault*, 387 U.S. 1 (1967).

59. *Id.*

60. *In re Winship*, 397 U.S. 358 (1970).

61. *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy clause prohibits adult criminal prosecution of youth after conviction in juvenile court for same offense).

62. *Fare v. Michael C.*, 442 U.S. 707 (1979) The Court "assume[d] without deciding that the Miranda principles were fully applicable to the present [juvenile] proceedings." *Id.* at 717 n.4.

63. 403 U.S. 528 (1971).

64. *In re Gault*, 387 U.S. 1, 13 (1967).

II. Status Offenses

Status offenses are acts committed by juveniles that would not be a crime if committed by an adult.⁶⁵ The most common status offenses are running away from home and truancy.⁶⁶ Status offenders differ from juvenile delinquents in that the latter have violated federal, state, or local law.⁶⁷ Juvenile courts have jurisdiction over both juvenile delinquents and status offenders.⁶⁸

A. Status Offenders as Dependent or Neglected Children

Juvenile courts also have jurisdiction over dependent or neglected children. Many courts now label status offenders as Children in Need of Protection (CHIPs),⁶⁹ or as Children in Need of Supervision (CHINS).⁷⁰ Traditionally, these categories were reserved for dependent or neglected children only.⁷¹ By including

65. FELD, *supra* note 9.

66. *Id.*

67. MINN. STAT. § 260.015 subd. 5 (1992) (defining a "delinquent child" as an individual under 18 years of age who violates any state, local, or federal criminal law).

68. Minnesota statute provides that the "juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be delinquent, a juvenile traffic offender, a juvenile petty offender, in need of protection or services, or neglected and in foster care" MINN. STAT. § 260.111 subd. 1 (1992).

69. The Minnesota statute provides that:

Subd. 2a. "Child in need of protection or services" means a child who is in need of protection or services because the child: . . .

(9) is one whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others. An injurious or dangerous environment may include, but is not limited to, the exposure of a child to criminal activity in the child's home;

(10) has committed a delinquent act before becoming ten years old;

(11) is a runaway;

(12) is an habitual truant.

MINN. STAT. § 260.015 (1992).

70. Alabama defines a child in need of supervision as a child who:

a. Being subject to compulsory school attendance, is habitually truant from school; or

b. Disobeys the reasonable and lawful demands of the child's parents, guardian, or other custodian and is beyond their control; or

c. Has committed an offense established by law but not classified as criminal or one applicable only to children; and

d. In any of the foregoing, is in need of care or rehabilitation.

ALA. CODE. § 12-15-1 (1993).

71. For example, in 1988, the Minnesota legislature voted to categorize runaways and truant as children in need of protection or services (CHIPs). 1988 Minn. Laws 673. The statute defines a CHIP as a child who:

(1) is abandoned or without parent, guardian, or custodian;

(2) (i) has been a victim of physical or sexual abuse, or

(ii) resides with or has resided with a victim of domestic child abuse . . .

(iii) resides with or would reside with a perpetrator of domestic child abuse . . .

(iv) is a victim of emotional maltreatment . . .

runaways and truants in these categories, it is difficult to determine the number of juveniles charged with status offenses.⁷² Furthermore, combining these groups with statistics on dependent and neglected children has made it difficult to measure the differential treatment of female and male status offenders within the system. It becomes nearly impossible to monitor the progress of status offenders through the juvenile system and to determine the disposition they ultimately receive. This blurring of lines increases the likelihood that unequal or unduly harsh treatment will go undetected by outside observers.

B. *Denial of Due Process Rights for Status Offenders*

Status offenders have none of the due process protections afforded juvenile delinquents.⁷³ While states may provide due process rights to status offenders, most have failed to do so.⁷⁴ Because the judiciary views their role toward status offenders as rehabilitative,⁷⁵ rather than punitive, courts provide little procedural protections to status offenders.⁷⁶

*In re Spalding*⁷⁷ illustrates the lack of protections afforded status offenders. Spalding was charged with both delinquency and being a child in need of supervision because she allegedly engaged in "acts of sexual intercourse and sexual perversion with an un-

(3) is without necessary food, clothing, shelter, education, or other required care for the child's physical or mental health or morals . . .

(4) is without the special care made necessary by a physical, mental, or emotional condition . . .

(5) is medically neglected . . .

(6) is one whose parent, guardian, or other custodian for good cause desires to be relieved of the child's care and custody;

(7) has been placed for adoption or care in violation of law;

(8) is without proper parental care because of the emotional, mental, or physical disability, or state of immaturity of the child's parent, guardian, or other custodian;

.....

MINN. STAT. § 260.015 subd. 2a (1992). Status offenders then may face any of the dispositions available for CHIPs. MINN. STAT. § 260.191 subd. 1 (a)(1)-(4) (1992). The statute also provides additional dispositions, available for the child who "was adjudicated in need of protection or services because the child is a runaway or habitual truant." MINN. STAT. § 260.191 subd. 1 (b)(1)-(8) (1992).

72. Since many states include status offenders with statistics on dependent/neglected children, it is impossible to know exactly how many children are charged with status offenses.

73. See *supra* notes 58-64 and accompanying text. For a discussion of due process rights of status offenders see Erin M. Smith, *In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 LAW & INEQ. J. 253 (1992).

74. *Id.* at 259.

75. See *supra* note 47 and accompanying text.

76. See Smith, *supra* note 73, at 257.

77. 332 A.2d 246 (Md. 1975).

known number of males and females for a period of more than one year."⁷⁸ Spalding attempted to assert her privilege against self-incrimination.⁷⁹ The Maryland Court of Appeals, purporting to follow *Gault*,⁸⁰ denied Spalding this right.⁸¹ The court decided that Spalding was actually a victim, and held that the delinquency petition was an "anomaly."⁸² The court stated that "since [Spalding] was not charged with an act which, in the circumstances of this case, would constitute a crime if committed by an adult, the privilege against self-incrimination is not applicable to these proceedings."⁸³ Even though the court considered Spalding a victim, it still removed her from her home.⁸⁴ The court denied her right against

78. *Id.* at 248 n.2. The petition further contended that Spalding was "ungovernable and beyond the control of her parent, deports herself in such a manner as to be a danger to herself and others and is in need of care and treatment." *Id.*

The court quoted with approval the Maryland Court of Special Appeals' explanation of the difference between an adjudication of delinquency and a finding that a child is a 'child in need of supervision':

[A]n important purpose of the legislative revision of the juvenile code was to insulate certain forms of juvenile misconduct from the consequences of an adjudication of delinquency as described in *Gault*. The creation of the category of CINS reflects a studied design of the legislature to insure that treatment of children guilty of misconduct peculiarly reflecting the propensities and susceptibilities of youth, will acquire none of the institutional, quasi-penal features of treatment that in *Gault's* view had been the main difference between the theory and the practice of the juvenile court system.

Id. at 252.

79. *Id.* at 260.

80. *In re Spalding*, 332 A.2d 246 (Md. 1975). The Supreme Court, in *Gault*, developed a two-part test to determine whether a constitutional right applied to juveniles. First, the proceeding must be to adjudicate delinquency. Second, the delinquency must be such that it could result in commitment to a state institution. *Gault*, 387 U.S. at 49.

81. *Spalding*, 332 A.2d at 246. Using the *Gault* test, the *Spalding* court concluded that children in need of supervision (CINS) are not eligible for the right against self-incrimination even though the *Gault* court actually said that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and with exception. And the scope of privilege is comprehensive." *Gault*, 387 U.S. at 52.

82. *Spalding*, 332 A.2d at 256.

[I]n the context of all the material events, which ensued during the critical period, since she was, in fact, a victim, the charge of 'delinquency' in the petition must be regarded as simply an unexplained anomaly That this was the position of the police is borne out not merely by their subsequent testimony, but also by their immediate application for adult arrest warrants listing the girls as victims; the overnight detention for the purpose of 'protective custody'; and the total absence of suggested criminality on the part of the girls in any police records.

Id.

83. *Id.* at 257.

84. *Id.* at 251 (committing Spalding to the jurisdiction of the Department of Juvenile Services for placement in a foster home).

self-incrimination, then deprived her of her liberty by ordering her to live in a foster home.

In re Spalding demonstrates the injustice in status offender cases. Status offenders do not have the due process rights afforded to delinquent juveniles and adults. Courts deny these rights, yet at the same time they deny status offenders their liberty. In one sense, status offenders are treated like adults in that they can be deprived of their liberty as a form of punishment.⁸⁵ At the same time, they are treated like children in that they are denied due process rights.⁸⁶ In this way status offenders receive the worst of both worlds.⁸⁷

C. *Juvenile Justice and Delinquency Prevention Act*

Before 1974, juvenile detention facilities routinely housed both juvenile delinquents and status offenders.⁸⁸ In some states, juveniles were incarcerated in adult facilities with adult criminal defendants.⁸⁹ In response to this and other national juvenile justice problems, Congress passed the JJDPa in 1974.⁹⁰ The JJDPa directed participating states to incarcerate juvenile delinquents and adults in separate facilities and to completely deinstitutionalize status offenders.⁹¹

"Valid Court Order" Amendment

The JJDPa's mandate to deinstitutionalize status offenders frustrated juvenile court judges' ability to deal with status offenders. Judges found themselves in the position of repeatedly ordering

85. Status offenders face placement in "secure detention facilities" if they violate a "valid court order." See 42 U.S.C. §§ 5603 (12) & (13) and 5633 (a)(12)(A); see also *infra* notes 92-97; see *supra* notes 53-58 and accompanying text.

86. See *supra* notes 69-76 and accompanying text.

87. See *supra* note 53.

88. See Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 999 (1991).

89. See *id.*

90. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified at 42 U.S.C. § 5601-778 (1988 & Supp. 1989)). During congressional debate the articulated purposes of the JJDPa were stated as "develop[ing] effective methods of preventing and reducing juvenile delinquency, diverting juveniles from the juvenile justice system, and providing critically needed alternatives to incarceration." 120 CONG. REC. 25,162 (1974).

91. The JJDPa originally provided that in order for a state to receive formula grants the state needed to submit a plan designed to ensure that "within two years . . . juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult . . . shall not be placed in juvenile detention or correctional facilities." Juvenile Justice Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (current version at 42 U.S.C. § 5633 (a)(12)(A) (1988 & Supp. 1989)).

runaways to remain in unlocked facilities, only to have them run away again.⁹² In response, Congress passed an amendment to the JJDPa in 1980 allowing juvenile courts to incarcerate status offenders for violating a valid court order.⁹³ The amendment provides that a juvenile can be detained in a secure detention facility if the juvenile commits any offense that would be a crime if committed by an adult, or if the juvenile has violated a "valid court order."⁹⁴

In most states, a judge can issue an order requiring a status offender to stay at home, live in foster care, attend counseling, or any of several other dispositions provided by statute.⁹⁵ When a juvenile violates that court order, the 1980 amendment to the JJDPa allows the juvenile court to place the child in a secure detention or

92. During the House debate of the "valid court order" amendment, Representative Ashbrook read part of a judicial opinion in which the judge reported one girl's history in the juvenile courts. The girl had repeatedly run away from halfway houses and treatment facilities. Because she was always placed in unlocked facilities, the juvenile courts were unable to keep her in any single placement. 126 CONG. REC. 30,227 (1980).

93. The 1980 amendment provided, in part:

[J]uveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of *valid court orders* . . . shall not be placed in secure detention facilities or secure correctional facilities . . .

42 U.S.C. § 5633 (a)(12)(A) (1988) (emphasis added) (codifying Act of Dec. 8, 1980, Pub. L. No. 96-509, § 11(a)(13), 94 Stat. 2757).

94. *Id.*

95. See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 39G (West 1992); N.H. REV. STAT. ANN. § 169-D:17 (1990). In Minnesota, the court can order a runaway juvenile to remain at home, attend school, or to obey his or her parent(s). Minnesota state law allows a court to order any of the following dispositions:

- (1) counsel the child or the child's parents, guardian, or custodian;
- (2) place the child under the supervision of a probation officer or other suitable person in the child's own home under conditions prescribed by the court, including reasonable rules for the child's conduct . . . designed for the physical, mental, and moral well-being and behavior of the child. . . .
- (3) subject to the court's supervision, transfer legal custody of the child to one of the following:
 - (i) a reputable person of good moral character. . . .
 - (ii) a county probation officer for placement in a group foster home. . . .
- (4) require the child to pay a fine of up to \$100. . . .
- (5) require the child to participate in a community service project;
- (6) order the child to undergo a chemical dependency evaluation and, if warranted by the evaluation, order participation by the child in a drug awareness program or an inpatient or outpatient chemical dependency treatment program;
- (7) . . . the court may recommend to the commissioner of public safety that the child's driver's license be canceled [sic] for any period up to the child's 18th birthday;
- (8) require the child to perform any other activities or participate in any other treatment programs deemed appropriate by the court.

MINN. STAT. § 260.191 subd. 1(b)(1)-(8) (1992).

correctional facility.⁹⁶ In other words, a status offender may be incarcerated in a secure facility, despite never having committed a crime.⁹⁷

The indeterminate nature of juvenile sentencing allows a juvenile who violates a valid court order to be incarcerated for years at a time.⁹⁸ In Minnesota, juvenile courts generally retain dispositional jurisdiction over juveniles until they are nineteen years old.⁹⁹ Thus, a thirteen year old who violates a court order requiring her to attend school could theoretically be incarcerated for as long as six years.¹⁰⁰

Juveniles violate court orders and fall within the JJDPA amendment for many different reasons. Many juveniles run away because of abuse or neglect at home.¹⁰¹ Others are "throwaways,"

96. The federal statute defines "secure detention facility" as any public or private residential facility which

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and

(B) is used for the temporary placement of any juvenile who is accused of having committed an offense, of any non-offender, or of any other individual accused of having committed a criminal offense.

42 U.S.C. § 5603(12)(A) & (B).

The statute defines a "secure correctional facility" as any public or private residential facility which

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and

(B) is used for the placement, after adjudication and disposition, of any juvenile who has been adjudicated as having committed an offense, any non-offender, or any other individual convicted of a criminal offense.

42 U.S.C. § 5603(13)(A) & (B).

97. It is this aspect of the amendment which is most troubling. It makes no sense to place a non-delinquent status offender in a facility with delinquent juveniles. If children are truly impressionable and susceptible to dangerous influences then is locking them up with delinquent juveniles really "in their best interest?" See *infra* Part III. D.

98. Theoretically, the role of the juvenile court is to protect children, rather than punish them. See *supra* notes 45-52 and accompanying text. Thus, the courts may impose a disposition for an indeterminate amount of time, as long as it is in the best interests of the child.

99. MINN. STAT. § 260.181 subd. 4 (1992). The age at which the juvenile court loses jurisdiction over an individual varies from state to state.

100. The facility may be far away from the child's neighborhood, school, friends, work and community resources. Minnesota law is silent on the subject of where a child may be incarcerated. Location of the facility may have a significant impact on juveniles living in rural areas. If there is no juvenile facility in the child's community, the youth could be sent to a facility in another part of the state.

101. See Aric Press, *When Children Go to Jail*, NEWSWEEK, May 27, 1985, at 87. "Some youths are guilty of nothing more than being abused by their parents: they are locked up for their own protection." *Id.* Paul Mones, legal director of the Public Justice Foundation in Santa Monica, CA, called incarceration of juveniles "the most insidious form of child abuse, because it is state-sanctioned." *Id.*

forced out of their homes by their parents.¹⁰² Under the JJDPa courts may detain these juveniles in secure facilities. Although in some circumstances it may be appropriate to formally place these juveniles out of the home, removing them as "status offenders" burdens them with undeserved stigma and dangerous exposure to criminal influence. The counterproductive nature of the "valid court order" amendment and the perversion of the "best interest of the child" standard is made manifest in the legislative history of the amendment.

Legislative History

The National Council of Juvenile and Family Court Judges (Council of Judges)¹⁰³ supported passage of the "valid court order" amendment.¹⁰⁴ The Council was instrumental in getting the bill through the House of Representatives, in which there was considerable opposition.¹⁰⁵ Judge John Milligan, speaking to the House Education and Labor Committee on behalf of the Council of Judges, emphasized the need to protect girls from society and from sex.¹⁰⁶ He proposed giving judges more discretion to deal with these girls.¹⁰⁷ Judge Milligan's comments reflect the paternalistic view that guides many juvenile court judges.¹⁰⁸

102. See Chung, *supra* note 88, at 1005. Throwaways are forced out of their homes by their parents because of family conflict or for economic reasons. *Id.*

103. The National Council of Juvenile and Family Court Judges was formed in 1937 by a group of juvenile court judges. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 91-92 (1989). The Council is "dedicated to improving the juvenile justice system" in the United States. *Id.* at 92 (quoting National Conference of State Legislatures (1988)).

104. U.S. Rep. Ashbrook, author of the amendment, commended the Council of Judges for "work[ing] long and hard to convince legislators that their ability to deal with juvenile offenders was severely hampered by restrictions on the implementation of their valid court orders." 126 CONG. REC. 30,296 (1980).

105. The amendment failed in committee. *Id.* Rep. Ashbrook then introduced the amendment to the full house, where it passed with a 239 to 123 vote. 126 CONG. REC. 30,232 (1980).

106. "Horror stories of chronic runaways who have been abused, raped, prostituted, and sometimes murdered should underscore the imperative of some ultimate, bottom-line authority over such youth." *Id.* at 30,296-97.

107. *Id.*

108. In 1975, Hunter Hurst, director of the Juvenile Justice Division of the Council of Judges, gave his impressions of the juvenile justice system in a speech to the New Mexico Council on Crime and Delinquency. Hunter Hurst, Juvenile Status Offenders, Address Before the New Mexico Council on Crime and Delinquency (June 20, 1975) cited in Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, 23 CRIME & DELINQ. 121, 127 (1977). He gave his impressions of the JJDPa's treatment of status offenders and the lack of discretion it gave to judges to deal with them. According to Hurst, society does not like to think of girls as sexually promiscuous. "It's not the way we like to think about females in this country." *Id.* He advocated giving judges more discretion for dealing with girls, arguing that "[a]s long as it offends our values, be sure

Judge Milligan anticipated questions about the possibility that judges would abuse the discretion afforded them in the 1980 amendment. According to Judge Milligan, the phrase "valid court order" protects juveniles.¹⁰⁹ Judge Milligan claimed that "[a] 'valid court order' means one that is issued after full due process rights have been accorded to the youth"¹¹⁰ He then listed the due process rights available to juveniles in delinquency proceedings through *In re Gault*.¹¹¹ Judge Milligan's proposal, however, fails to recognize that procedural safeguards are not in place for status offense proceedings.¹¹²

Debate in the House of Representatives further demonstrates the paternalistic attitudes contributing to the passage of the JJDPa amendment.¹¹³ Representative Ashbrook, in a written speech entered into the Congressional Record, listed the organizations opposed to the amendment,¹¹⁴ and suggested that

[m]aybe our learned judges should take a moment of their time to talk to some of these groups like a Dutch uncle and instill some sense of what is really involved in these issues. Girl Scouts of the U.S.A.? Now really. Maybe when the Scouts grow up they will see things differently.¹¹⁵

He concluded his speech saying "[s]ociety won today. Parents won today. Our fine judges won today."¹¹⁶

Representative Ashbrook clearly expressed his feeling that judges are best able to meet the needs of runaway girls.¹¹⁷ His comments suggest that giving judges more discretion will always be

that police, or the church or vigilante groups, or somebody is going to do something about it. For me, I would rather that something occur in the court where the rights of the parties can be protected." *Id.*

Hurst's language reflects the feeling of some judges on the Council, that society ought to prevent females from being sexually active. It suggests that the predominant role of the juvenile court is to "protect" females by controlling their sexuality, rather than meeting the girls' individual needs. This view conflicts with the stated goal of the juvenile court system, which is the individualized treatment of juveniles according to the best interests of the child. The clear implication of Judge Hurst's comments is that sexist attitudes in society justify sexist treatment of juveniles in court.

109. 126 CONG. REC. 30,297 (1980).

110. *Id.*

111. *Id.*

112. See *supra* notes 73-86 and accompanying text.

113. 126 CONG. REC. 30,227-232 (1980).

114. Forty-two organizations serving youth opposed the amendment. These organizations included such well respected national organizations as the YMCA, American Civil Liberties Union, National Council on Crime and Delinquency, National League of Cities, National Council of Jewish Women, National Youth Work Alliance, and the American Red Cross Youth Services. *Id.* at 30,297.

115. *Id.*

116. *Id.*

117. *Id.*

in the best interest of the child. He favored giving judges complete discretion in dealing with status offenders, including discretion to order institutionalization.

Institutionalization, however, increases judicial discretion. Increased discretion gives judges greater power to impose personal values on juveniles. A judge's personal values are not always best for the child.

In addition to the paternalistic goals, Congress demonstrated punitive goals in passing the "valid court order" amendment. During debate in the House, legislators repeatedly referred to run-aways' ability to "flout the will of the court" if judges did not have the authority to place them in secure facilities.¹¹⁸ These comments indicate the legislature's desire to punish rebellious or non-conforming juveniles.

The "valid court order" amendment was also adopted to enable parents to exert more control over their children. The Council of Judges emphasized the need of Congress to "underwrite families and schools in meeting their custody, care, and education responsibilities."¹¹⁹ The amendment gives parents greater leverage in trying to control their daughters' sexuality. Running away from home may euphemistically be used to describe a child who repeatedly stays out all night, or spends the night at her boyfriend's house.¹²⁰ Many parents continue to be more concerned about this type of behavior in a female teenager than in a male teenager.¹²¹ This disparate treatment of juveniles has a negative impact on females, evidenced by the difference in numbers of reported female status offenders as compared to male status offenders. Of the juveniles who have petitions¹²² filed against them in juvenile court, females

118. 126 CONG. REC. 30,228-232 (1980) (statements by Rep. John Ashbrook and Rep. E. Thomas Coleman).

119. *Id.* at 30,297.

120. See Donna M. Bishop & Charles E. Frazier, *Gender Bias in Juvenile Justice Processing: Implications of the JJDP Act*, 82 J. CRIM. L. & CRIMINOLOGY, 1162, 1163 (1992). A parent can easily report a child as a runaway, even though the parent's real concern is with the child's sexuality. Teenage sexual behavior often involves staying out late, or all night, which enables a parent to report a child as a runaway.

121. Meda Chesney-Lind, *Guilty by Reason of Sex: Young Women and the Juvenile Justice System*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 77, 90-91 (Barbara Raffen Price & Natalie J. Sokoloff eds., 1982). Meda Chesney-Lind suggested that "[f]amilies have always had different expectations and made different demands of male and female children. From their sons, parents expect achievement, aggressiveness, independence, but from their daughters obedience, passivity, and implicitly, chastity." *Id.* at 90-91 & n.72.

122. A petition is the formal initiation of the juvenile process. It fills the same function that a complaint fills in the adult criminal system. FELD, *supra* note 9.

are more likely than males to have a petition filed because of a status offense.¹²³

III. Judicial Discretion and Paternalism in the Juvenile Court System

A. Gender Discrimination Against Female Status Offenders

The history of paternalism in the juvenile court system has resulted in the discriminatory treatment of female juveniles.¹²⁴ The Minnesota Supreme Court Gender Fairness Task Force¹²⁵ (Task Force) found that female runaways in Minnesota receive more severe sentences than male runaways.¹²⁶ The Task Force also found evidence that judges retain sexist, paternalistic attitudes toward female juveniles.¹²⁷ Other commentators document similar trends nationwide.¹²⁸ For example, a recent study of the Florida juvenile justice system reports that girls found in contempt of court are much more likely than boys to be sentenced to incarceration in secure detention facilities.¹²⁹

123. This is true both in Minnesota and nationwide. In Minnesota, in 1992, 37% of the petitions filed against females were for status offenses, while only 22% of the petitions filed against boys were for status offenses. Telephone Interview with Sharon Caretich, Supreme Court Office of Research and Planning (Oct. 6, 1993).

124. Unequal treatment of status offenders based on gender is well documented. See, e.g., Bishop & Frazier, *supra* note 120; Barry C. Feld, *Right to Counsel in Juvenile Court*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1274-80 (1989) [hereinafter *Right to Counsel*]; Marvin D. Krohn et al., *Is Chivalry Dead? An Analysis of Changes in Police Dispositions of Males and Females*, 21 CRIMINOLOGY 417 (1983); Susan K. Datesman & Frank R. Scarpitti, *Unequal Protection for Males and Females in the Juvenile Court*, in WOMEN, CRIME, AND JUSTICE (Susan K. Datesman & Frank R. Scarpitti eds., 1980). But see Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263 (1980); Katherine S. Teilman & Pierre H. Landry Jr., *Gender Bias in Juvenile Justice*, 18 J. RES. CRIME & DELINQ. 47 (1981).

125. The Gender Fairness Task Force was created in 1987 to "explore the extent to which gender bias exists in the Minnesota state court system, to identify and document gender bias where found, and to recommend methods for its elimination." *Preface to Minnesota Supreme Court Task Force for Gender Fairness in the Courts*, Final Report, reprinted in 15 WM. MITCHELL L. REV. 825, 835 (1989) [hereinafter *Final Report*].

126. *Final Report*, *supra* note 125, at 911.

127. One attorney interviewed by the Task Force reported that she often heard a judge comment on a female juvenile's physical attractiveness. *Id.* at 909. In another case, a judge reportedly ordered a girl to reappear without jewelry and makeup and remarked that "you look like a whore with all that makeup on anyway." *Id.* Another attorney commented that "[t]he juvenile court is the real bastion of sexism and paternalism in the criminal justice system." *Id.* at 908.

128. See, e.g., Bishop & Frazier, *supra* note 120; Krohn et al., *supra* note 124, at 418.

129. Bishop & Frazier, *supra* note 120, at 1185. The study discussed in the article analyzed records of status and non-status offense referrals processed in Florida over

Parents also contribute to unequal treatment of girls by subjecting their daughters to the court system. Parents often refer runaways to juvenile court.¹³⁰ While police or probation officers are generally responsible for youths entering the juvenile system for delinquency offenses, parents more often refer runaways.¹³¹ Some scholars suggest that parents report their daughters to juvenile courts as runaways when they become sexually active.¹³² Fearing that they will lose control of their daughter's sexuality, parents turn to the court for assistance in controlling their daughter's sexual behavior.¹³³ Consequently, many girls end up in the juvenile justice system.¹³⁴

When judges and parents use the JJDPa to control teenage female sexuality, they perpetuate the paternalistic agenda begun with adultery and statutory rape laws.¹³⁵ The "valid court order" amendment criminalizes behavior that the legislature considers immoral, in the same manner that adultery, abortion, and statutory rape laws punish immoral behavior. The amendment allows both parents and judges to act upon their own sense of morality. The judicial discretion granted by the "valid court order" permits a judge at one moment to incarcerate a female for sexual activity, and at the next moment to dismiss identical male sexual behavior.

B. 1980 Amendment Has Allowed Juvenile Court Judges to Continue Their Paternalistic Agenda

The "valid court order" amendment less obviously controls female sexual behavior than past laws such as fornication and statu-

a three year period from 1985 to 1987. *Id.* at 1168. The study looked at the effects of social characteristics (gender, race, and age), current offense (seriousness and contempt status), and offense history on court referral, adjudication, and disposition. *Id.* at 1169-74. The study also explored the effects of judicial decisions made at earlier stages in the process on subsequent outcomes. This allowed for identification of "indirect effects of gender on case outcomes." *Id.*

130. *Id.* at 1178-79.

131. *Id.* at 1163, n.5. This is significant because the parent is often the only link the child has to an attorney. If the state does not provide representation for the child, the parent is usually the only other source for legal services. Most children do not have the financial resources to access legal assistance on their own. If the parent brings the child to the juvenile justice system, it is unlikely that the parent would then assist in the child's defense. This may account, in part, for the lower rates of representation among status offenders. See *Right to Counsel*, *supra* note 124, at 1223.

132. See Chesney-Lind, *supra* note 121, at 90-91.

133. *Id.*

134. Most status offenders are girls and they face legal action for running away or for truancy. See *supra* notes 94-103 and accompanying text; see also *supra* notes 119-23 and accompanying text.

135. See *supra* notes 109-12 and accompanying text; see also *supra* notes 38-44 and accompanying text.

tory rape statutes. In practice, however, the "valid court order" amendment works as a device to restrict female sexuality. Since 1980, judges have disproportionately sentenced girls to secure detention facilities for disobeying court orders.¹³⁶ One recent study provides empirical data to support the conclusion that court orders have been used to incarcerate relatively more female status offenders than male status offenders.¹³⁷

The 1980 amendment permits unequal treatment through its addition of discretion. Whenever discretion is available, the possibility of unequal treatment increases.¹³⁸ When a judge has unchecked discretion, he or she is free to make decisions based on gender or the judge's own personal sense of morality, rather than on the offense committed.

Courts and legislatures have increasingly limited judicial discretion in processing juvenile delinquents and adults.¹³⁹ Specific due process rights for juveniles¹⁴⁰ and, in some states, sentencing guidelines for juveniles,¹⁴¹ illustrate a trend toward more formal processing and less judicial discretion for juvenile offenders.¹⁴² In contrast, status offenders, arguably the most vulnerable group in the criminal justice system,¹⁴³ are afforded the least amount of formal protection and are subjected to the most judicial discretion. The dangers of this lack of protection amplify the need for juvenile representation. Children usually do not have the resources avail-

136. See, e.g., Bishop & Frazier, *supra* note 120, at 1185.

137. *Id.* (concluding that "females found in contempt are much more likely than their male counterparts to be sentenced to a period of up to six months' incarceration in secure detention facilities").

138. See Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 255 (1984).

139. For example, in Minnesota "[o]ne of the primary purposes of the Minnesota Sentencing Guidelines was to eliminate disparities based on factors such as race, gender, socioeconomic status and community ties" Blake Nelson, *The Minnesota Sentencing Guidelines: The Effects of Determinate Sentencing on Disparities in Sentencing Decisions*, 10 LAW & INEQ. J. 217 (1992).

140. See *supra* notes 58-64 and accompanying text.

141. As of 1991, almost one third of states used for serious offenders either minimum mandatory sentencing, determinate sentencing statutes, or administrative sentencing guidelines. These sentences are not based on the needs of the juvenile, but rather on the crime they have committed. *The Principle of Offense*, *supra* note 46, at 889-90.

142. As juveniles are granted more procedural safeguards, juvenile proceedings become more formal. The addition of the right to counsel, the privilege against self-incrimination, and the other due process rights, necessarily removes the informal atmosphere traditionally present in juveniles hearings. See *Right to Counsel*, *supra* note 124, at 1187-88; see generally FELD, *supra* note 9.

143. Status offenders are more vulnerable because they tend to be younger than juvenile delinquents. Because of their age they are less likely to have previously encountered the juvenile justice system and are less able to defend themselves. See *Right to Counsel*, *supra* note 124, at 1232-33.

able to obtain counsel on their own. Normally the responsibility for providing counsel falls on the juvenile's parents. Because status offenders are referred to the court by their parents,¹⁴⁴ the parents do not often retain counsel for them.¹⁴⁵ Because status offenders lack counsel at the initial hearing, there is unlikely to be an appeal. Therefore, a juvenile judge's discretion is rarely questioned. Thus, this vulnerable group, which is in particular need of statutory and constitutional protections, continues to have fewer protections than juvenile delinquents or adults.¹⁴⁶

C. Punishment

Punishing status offenders is unjustified, harmful both physically and mentally, and undermines the goals of having a juvenile justice system.¹⁴⁷ By definition, a status offender has not committed a crime. At most, the juvenile has done something which our society feels is inappropriate at their age, but which would be acceptable if the person were older. Sentencing jurisprudence holds that a just system of punishment should only punish an offender for an offense.¹⁴⁸ Thus, in a just system, status offenders should not face punishment. Furthermore, punishment is particularly unjusti-

144. See, e.g., *supra* notes 4-6 and accompanying text; see also *supra* notes 131-33 and accompanying text.

145. Status offenders have low rates of representation by counsel. While only 28.9% of status offenders in Minnesota have legal representation, 45%-77% of juveniles charged with more serious offenses are represented by counsel. *Right to Counsel*, *supra* note 124, at 1232-33.

146. See *supra* note 73 and accompanying text. Once juveniles are committed to detention facilities, the discriminatory treatment continues. CORAMAE R. MANN, *FEMALE CRIME AND DELINQUENCY* 150-51 (1984). Studies indicate that females are more often subjected to physical examinations. *Id.* One study found that gynecological examinations were ordered for 70% to 80% of girls suspected of sexual activity, while only 12% to 18% of boys suspected of sexual activity were subject to physical examinations. *Id.* at 150 (citing Meda Chesney-Lind, *Judicial Enforcement of the Female Sex Role: The Family Court and the Female Delinquent*, 8 *ISSUES IN CRIMINOLOGY* 51, 51-59 (1973)). Another study found that every girl in one facility was subjected to gynecological examinations. *Id.* at 151 (citing TED RUBIN, *JUVENILE JUSTICE* 90 (1979)). In addition to the invasion of the girl's right of privacy, these examinations show that the courts assume that female sexuality equals delinquency. *Id.* (citing Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, 23 *CRIME & DELINQ.* 121-30 (1979)). These examinations, in addition to being intrusive and uncomfortable, may be extremely humiliating to a teenage girl. *Id.* The presence of the examinations also demonstrates the juvenile system's interest in detecting female sexuality. *Id.* at 150 & n.56 (citing Elaine Selo, *The Cottage Dwellers: Boys and Girls in Training Schools*, in *THE FEMALE OFFENDER* 154 (Laura Crites, ed. 1976)).

147. See *supra* notes 45-50 and accompanying text.

148. H.L.A. HART, *PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT*, reprinted in *PUNISHMENT AND RESPONSIBILITY* 11 (H.L.A. Hart ed., 1968) (explaining the retributivist moral imperative of not punishing someone who has not committed a crime).

fied given that status offenders are afforded no due process rights. It is a perversion of our justice system to punish juveniles who have not committed a crime, without allowing them due process rights.

Many of the incarceration facilities provide a dangerous physical and psychological environment for status offenders.¹⁴⁹ The same facility often holds both delinquents and status offenders together.¹⁵⁰ Thus, a thirteen year old runaway can stay with a seventeen year old drug dealer. This raises questions about whether the environment is healthy and safe, much less rehabilitative for the thirteen year old. This situation may be psychologically and socially damaging to the child because the child may learn criminal behavior and develop anti-social attitudes in an attempt to conform. This living situation is not the safe, nurturing atmosphere envisioned by the Progressives. At its inception, the JJDPA was designed to remove juveniles from adult jails and to deinstitutionalize status offenders.¹⁵¹ It is consistent with those goals to place status offenders and juvenile delinquents in separate facilities.

The American juvenile justice system has always considered the role of the courts with respect to status offenders as one of rehabilitation.¹⁵² This traditional goal of the juvenile system is not served through incarceration. Punishment in itself does not rehabilitate, because it does not address the underlying problems. Punishment incapacitates and serves retributive purposes, but is rarely viewed as an appropriate form of rehabilitation.

The goal of rehabilitation is also problematic. Inherent in the concept of rehabilitation is judicial discretion.¹⁵³ This judicial discretion leads to the paternalistic treatment of status offenders.¹⁵⁴ Female juveniles are brought into the juvenile system, and ultimately incarcerated, because they are acting in ways that the traditional patriarchy finds unacceptable.¹⁵⁵ Often, this unacceptable behavior is sexual in nature.¹⁵⁶

IV. Proposed Reforms of the Juvenile System

Congress certainly has an interest in keeping children safe, and families intact, if an intact family is in the youth's best inter-

149. See Chung, *supra* note 88, at 1006 (noting that "countless incarcerated juveniles fall victim to sexual assault, exploitation and other physical injury").

150. *Id.* at 1007.

151. See *supra* notes 88-91 and accompanying text.

152. See *supra* notes 45-50 and accompanying text.

153. See *supra* notes 51-52 and accompanying text.

154. See *supra* notes 10-22 and accompanying text.

155. See *supra* note 108 and accompanying text.

156. See, e.g., *supra* notes 77-84 and accompanying text. See also *supra* Part III.A.

ests. It is questionable, however, whether the 1980 amendment to the JJDPa accomplishes these goals. Given the juvenile court's history of gender bias,¹⁵⁷ the legislature should enact laws that limit the possibility of continuing this bias.

Ideally, status offenders should be dealt with outside of the juvenile justice system. The juvenile justice system has been ineffective in dealing with status offenders, using either the rehabilitative or punitive approaches. A new approach would be to treat status offenses as societal problems, not legal ones.¹⁵⁸ In the short term, immediate reforms such as repeal of the "valid court order" amendment, expansion of emancipation rights, and creation of due process rights for status offenders would result in a better system of juvenile justice. Aside from having a long range vision, immediate reform measure, like repeal, emancipation and securing due process rights, can begin a better system of juvenile justice.

A. *Repeal of the 1980 Amendment*

The most obvious solution to the problems created by the "valid court order" amendment is to repeal the amendment. Repealing the amendment would help to equalize treatment of female and male juveniles in the juvenile court system. Repeal of the amendment would decrease opportunities for judges to sentence juveniles based on their own values. Without the option of incarceration available, judges would be forced to give girls the same types of dispositions that have always been given boys.¹⁵⁹ While judges might continue to treat girls and boys unequally, the disparity would be less damaging to girls if they could not be given out-of-home placements. A judge would no longer have the option of incarcerating a girl simply because he personally disapproved of her behavior.

B. *Emancipation*

Another solution to the problems inherent in the "valid court order" amendment is the creation of a statute providing for emancipation of a minor child. Emancipation is the "process by which mi-

157. See *supra* notes 124-29 and accompanying text.

158. This framework would require that additional social service programs be made available to families in order to cope with the underlying problems within the family. More programs would also be needed for teenagers who leave their families to live independently.

159. Boys are less often referred to the juvenile system for status offenses. See *supra* note 123 and accompanying text. Those boys who are referred are more frequently ordered to live at home, even after repeated appearances in court. See *Right to Counsel*, *supra* note 124, at 1276.

nors attain legal adulthood before reaching the age of majority."¹⁶⁰ Currently, several states regulate emancipation by statute,¹⁶¹ while others recognize emancipation at common law. Minnesota falls in the latter category.¹⁶² Early cases relied on the parent's actions to determine whether a child was emancipated.¹⁶³ More re-

160. Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REFORM 239, 240 (1992). Each state defines emancipation either by statute or case law. In Minnesota, for example, emancipation means that the parent no longer has control over the child and the parent-child relationship is dissolved. See *Taubert v. Taubert*, 114 N.W. 763, 764 (1908); *Lufkin v. Harvey*, 154 N.W. 1097, 1098 (1915).

161. The California Legislature declared that:

It is the purpose of this part to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of the minor's status. This part is not intended to affect the status of minors who may become emancipated under the decisional case law that was in effect before the enactment of Chapter 1059 of the Statutes of 1978.

CAL. FAM. CODE § 70011 (1993). The Michigan statute provides:

[A] minor emancipated by operation of law or by court order shall be considered to have the rights and responsibilities of an adult, except for those specific constitutional and statutory age requirements . . . relevant to him or her because of his or her age. A minor shall be considered emancipated for the purposes of, but not limited to, all of the following:

- (a) The right to enter into enforceable contracts, including apartment leases.
- (b) The right to sue or be sued in his or her own right.
- (c) The right to retain his or her own earnings.
- (d) The right to establish a separate domicile.
- (e) The right to act autonomously, and with the rights and responsibilities of an adult
- (f) The right to earn a living
- (g) The right to authorize his or her own preventive health care . . . without parental knowledge or liability.
- (h) The right to apply for a driver's license or other state licenses
- (i) The right to register for school.
- (j) The right to marry.
- (k) The right to apply to the medical assistance program
- (l) The right to apply for other welfare assistance, including general assistance
- (m) The right, if a parent, to make decisions and give authority in caring for his or her own minor child.
- (n) The right to make a will.

MICH. COMP. LAWS § 722.4e (1992).

162. See *Taubert*, 114 N.W. at 764; *Lufkin*, 154 N.W. at 1098. Minnesota statutes define emancipation for specific purposes. See, e.g., MINN. STAT. § 144.341 (1992) (defining emancipation for purposes of giving consent for medical services); MINN. STAT. § 256D.05 subd. 1(10) (defining an emancipated minor for purposes of receiving General Assistance grants, as a "person under the age of 18 years who: (i) has been married; (ii) is on active duty in the uniformed services of the United States; (iii) has been emancipated by a court of competent jurisdiction; or (iv) is otherwise considered emancipated under Minnesota law").

163. See, e.g., *Taubert*, 114 N.W. at 764 (stating to constitute emancipation, "[t]here must be a surrender by the parent of the right to the services of his minor child, and also the right to the custody and control of his person").

cently, Minnesota courts have relied on the circumstances in the individual case, leaving the factual question of whether the child has been emancipated for a jury to decide.¹⁶⁴ The common law fails, however, to define the specific circumstances in which emancipation will be found.

Emancipation provides several benefits for juveniles who have trouble living with their parents. It allows older juveniles to legally live independently, free of parental control. Emancipation also allows juveniles to sign contracts, consent to medical treatment, and obtain an abortion, without parental consent.¹⁶⁵ Perhaps the main benefit for runaways is that emancipation takes the issue out of the courts and makes it possible for juveniles to begin building an adult life for themselves.¹⁶⁶ Emancipation prevents or removes the stigma associated with the label "status offender" or "dependent or neglected child."

Legal adulthood could also extend to the criminal justice system.¹⁶⁷ This may benefit juveniles who commit minor offenses because adults receive dispositions according to the culpability of their actions and juveniles receive dispositions based on their need for rehabilitation.¹⁶⁸ This difference in theory of disposition results in juveniles actually receiving longer sentences for the same crimes.¹⁶⁹ The adult system also provides for greater procedural safeguards.¹⁷⁰

Emancipation does, however, have certain drawbacks for the child. Termination of parental rights carries with it a termination of parental responsibilities. In most states, parents are not financially responsible for their emancipated children.¹⁷¹ If the child

164. *In re Fiihr*, 184 N.W.2d 22, 25 (1971).

165. See, e.g., *supra* note 161.

166. See Sanger & Willemsen, *supra* note 160, at 246. An unemancipated minor living independently can be repeatedly brought back to juvenile court on charges of running away from home. *Id.* Emancipation can make the juvenile's existing living situation legal. *Id.*

167. There are no constitutional barriers to prosecuting children in the adult system. See generally Ainsworth, *supra* note 50.

168. See *supra* notes 45-50 and accompanying text.

169. For example, a 17 year old juvenile may be sentenced to one year in a juvenile detention facility for shoplifting if the judge thinks the juvenile needs a year of rehabilitation. See *supra* notes 96-97 and accompanying text. An adult, however, could receive a maximum sentence of 90 days in jail for shoplifting. MINN. STAT. § 609.52 subd. 3(5) (1992).

170. See Smith, *supra* note 73, at 256-58.

171. See, e.g., CAL. FAM. CODE § 7050(a) (stating "[a]n emancipated minor shall be considered as being an adult for the following purposes: (a) The minor's right to support by the minor's parents"); *In re Sonnenberg*, 99 N.W.2d 444, 447 (Minn. 1959) ("[E]mancipation necessarily carries with it the implication that the minor has reached an age where in some substantial degree he is possessed of the capacity to earn wages and manage his own affairs.").

does not gain employment or other support, General Assistance often provides the only source of income for the child.¹⁷² Some parents use the option of emancipation to pressure their minor child into financial independence.¹⁷³ Emancipation should be a last resort for a juvenile unable to live at home, not an option for parents who want to save money.

An ideal emancipation statute would allow juveniles to become independent, while at the same time preventing parents from using it as a way to relieve themselves of financial responsibility. Michigan has such a statute.¹⁷⁴ The Michigan statute requires the parents of emancipated juveniles to financially support the minor, but the parents are not liable for debts incurred by the minor.¹⁷⁵ Due to the serious nature and consequences of emancipation, it should be available only as a last resort. Emancipation, however, provides a good option for juveniles who are unable to live in a troubled home and have exhausted other available remedies.¹⁷⁶ Passage, amendment and increased use of more ideal emancipation statutes furthers the juvenile justice system's efforts of reform.

C. Due Process Rights

The courts could aid in reforming the juvenile justice system by according full due process rights to status offenders.¹⁷⁷ With the passage of the "valid court order" amendment to the JJDPa, judges now incarcerate status offenders for non-criminal behavior. The *Gault* Court recognized that juvenile detention facilities punish more than rehabilitate.¹⁷⁸ Yet, status offenders may be sent to such facilities, even though they formally are "children in need of protection," and have committed no crime.

A denial of due process rights on this basis subverts the Court's reasoning in *Gault*. The Court in *Gault* found that the dispositions received by juveniles substantially resemble dispositions

172. In Minnesota, emancipated juveniles are eligible to receive general assistance if they meet the statutory definition of "legally emancipated." MINN. STAT. § 256D.05 subd. 1(10) (1993).

173. See Sanger & Willemsen, *supra* note 160, at 278.

174. MICH. COMP. LAWS § 722.4e(2) (1992).

175. "The parents of a minor emancipated by court order are jointly and severally obligated to support the minor. However, the parents of a minor emancipated by court order are not liable for any debts incurred by the minor during the period of emancipation." *Id.*

176. Ideally, a court would emancipate a juvenile only after the juvenile's family had attempted to remain together through participation in counseling, mediation, or other social services. See Sanger & Willemsen, *supra* note 160, at 344-47.

177. See generally Smith, *supra* note 73.

178. *In re Gault*, 387 U.S. 1, 27 (1967).

received by adults in the criminal system.¹⁷⁹ Consequently, juveniles deserve most of the same procedural protections adults receive.¹⁸⁰ Status offenders also face incarceration like delinquent juveniles and adults. Thus the reasoning in *Gault* applies equally to status offenders and suggests that courts should also award status offenders the full panoply of due process rights.

Due process rights decrease judicial discretion, making it more likely that females and males are treated equally and fairly. Status offenders deserve all the protections afforded adult defendants. Giving status offenders the right to be found "guilty" beyond a reasonable doubt and a mandatory, non-waivable right to counsel would be a step toward forcing the real issues of the juvenile's behavior out into the open. If every juvenile had legal representation in court, there would be a greater chance that all of the other constitutional rights of the juvenile would be protected.¹⁸¹ With no representation, it is unrealistic to expect that most juveniles will even be aware of their rights, much less be able to adequately assert them. With an attorney present, the juvenile has a better chance that her constitutional rights will be asserted.¹⁸² With this kind of formal protection, it is more difficult to punish a girl for being sexually active, under the guise of "running away from home."

Conclusion

Enactment of a law allowing out-of-home placement of juveniles as a consequence for running away from home or truancy is only logical if the goal of the placement is to protect the child from dangers on the street. Yet, the "valid court order" amendment

179. *Id.* "The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time." *Id.*

180. *Id.* at 27-28.

181. Fox, *supra* note 46, at 1236 ("The granting of procedural rights can hardly become a reality for children without lawyers to assert them on their behalf.").

182. See *In re Gault*, 387 U.S. at 38.

[N]o single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.

Id. at 38 n.65. (quoting Report by the President's Comm'n on Law Enforcement and Admin. of Justice, *The Challenge of Crime in a Free Society*, at 86-87 (1967) (known as Nat'l Crime Comm'n Report)).

to the JJDPa was largely the result of paternalistic and punitive goals of Congress and the National Council of Juvenile and Family Court Judges.

The punitive aspect of the 1980 amendment to the JJDPa is disturbing in light of the fact that status offenders do not have due process rights. There is currently a tension in the juvenile justice system between rehabilitation and punishment. Courts have come to realize that the juvenile system is in reality punitive. At the same time, many courts have tried to retain the traditional rehabilitative goals, especially when status offenders are affected. This has led to a situation in which status offenders are not afforded due process rights, but are still incarcerated. Status offenders continue to receive the worst of both worlds.

The "valid court order" amendment was also enacted, in part, as an attempt to control female sexual behavior. Laws criminalizing fornication, adultery, abortion, and statutory rape have been used throughout history to restrict female sexuality. This amendment, although more subtle, is equally useful in discriminatorily controlling female sexual behavior.

This amendment has resulted in continued gender bias in the dispositions of status offenders. The amendment grants judges the discretion to sentence status offenders according to their own personal values. Since the enactment of this amendment, judges may incarcerate female status offenders to restrict their sexuality, and at the same time ignore male sexual behavior. Parents also contribute to the gender bias by referring female juveniles to juvenile court for sexual behavior, while ignoring similar behavior in male juveniles.

A first step toward ending this bias would be to remove some of the discretion afforded juvenile court judges by repealing the "valid court order" amendment. Repeal of this amendment would require courts to deal with status offenders in ways other than sending them to detention facilities.¹⁸³ Laws concerning emancipation and due process rights would also provide additional security for juveniles. These measures would begin to ensure that female juveniles are treated fairly in the juvenile court system.

183. One possibility is that courts would develop better social service programs to help juveniles remain at home. Discussion of such programs is beyond the scope of this article.